WAN OTHMAN BIN DATUK WAN YUSOF

v.

KEWANGAN UTAMA (M) BHD.

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[ORIGINATING SUMMONS NO. KG. 119/92/II]
20 MARCH 1993

PRACTICE & PROCEDURE: Admissibility of affidavits - Non-compliance with requirements of O. 41 r. 5(1) Rules of the High Court 1980 - Affidavits containing hearsay evidence - Non-compliance with s. 60 Evidence Act 1950 - Whether offending paragraphs in the affidavits should be struck out.

At the hearing of the plaintiff's originating summons, Counsel for the plaintiff raised a preliminary objection as to the admissibility of three affidavits filed on behalf of the defendant.

The gist of Counsel's complaint was that the afidavits did not comply with the requirements of O. 41 r. 5(1) of the Rules of the High Court 1980 (RHC 1980) and s. 60 of the Evidence Act 1950 in that the affidavits contained matters :

(1) which were not within the personal knowledge of the deponent and which the deponent was not of his own knowledge able to prove;
(2) which were hearsay, irrelevant and unwarranted opinion and conjecture.

Held:

[1] Where in a proceeding, though interlocutory in form, an issue has to be determined which will decide the rights of the parties, only that evidence which would be admissible at the hearing of the action under the ordinary rules of evidence should be considered.

[2] There was nothing to indicate that the matters raised in the offending paragraphs of the affidavits were facts which the deponent was able of his own knowledge to prove. The paragraphs were merely the deponents opinion or conclusions on the contents of documents exhibited without clear justification and was irrelevant.

[3] Though the affidavits purport to exhibit documents the existence of which may be within the knowledge of the deponent, the deponent has gone beyond that requirement by expressing his views, conclusion and asserting the truth of the contents of the documents when he was not the maker and had no personal knowledge of the contents therein.

[4] The present application was not an interlocutory application generally as any decision thereof would decide the rights of the parties and as such the defendant could not resort to the provisions of O. 41 r. 5(2) RHC 1980 to remedy the defects in the affidavits.

[Plaintiff's preliminary objection allowed].

Cases referred to:

Gilbert v. Endean [1878] 9 Ch. 259 ***(refd)***
Rossage v. Rossage & Ors. [1960] 1 All ER 600 ***(refd)***
Mui Bank Bhd. v. Alkner Investments Pte Ltd. [1990] 3 MLJ 385 ***(refd)***
Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman [1985] 1 CLJ 552 / [1986] 1 MLJ 426 ***(refd)***
Re: J. (an infant) [1960] 1 All ER 603 at p. 605I to p.606A and D ***(refd)***
Kulanthayar Chettiar v. Koh Liak Phuang [1951] MLJ 149 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 60, 73A(2)
Rules of High Court 1980, O. 14 r. 2(2), 4(2), O. 38 r. 3, O. 41 r. 1(4), r. 5(1) & (2), r. 6 & r. 9(2)

For the plaintiff - T.O. Thomas; M/s T.O. Thomas & Co.
For the defendant - Sim Hui Chuan; M/s. Reddi & Co.

JUDGMENT

Richard Malanjum JC:

At the commencement of the hearing proper of the application of the plaintiff by way of originating summons Mr. T.O. Thomas learned Counsel for the plaintiff made a preliminary objection as to the admissibility of three affidavits filed on behalf of the defendant affirmed by one Awang Mokhtar bin Awang Yahya (hereinafter called "the deponent") on 29 September 1992, 11 December 1992 and 14 December 1992 respectively (hereafter collectively called "the said three affidavits"). Indeed such a move is necessary otherwise the plaintiff would be taken to have waived the requirement of strict proof. (See: *Gilbert v. Endean* [1878] 9 Ch. 259; *Rossage v. Rossage & Others* [1960] 1 All ER 600 and *Mui Bank Bhd. v. Alkner Investments Pte Ltd.* [1990] 3 MLJ 385).

A. *The arguments of the plaintiff and the defendant:*

The basic complaint of the learned Counsel for the plaintiff is that all the three said affidavits do not comply with the requirement of O. 41 r. 5(1) of the Rules of the High Court 1980 (hereinafter called the 'RHC 1980') and s. 60 of the Evidence Act 1950. Learned Counsel contended that the three said affidavits contain matters:

(i) which are not within the personal knowledge of the deponent;
(ii) that the deponent is not able of his own knowledge to prove;
(iv) irrelevant; and
(v) unwarranted opinion and conjecture.

Learned Counsel also submitted that there is no clear evidence of authorisation having been given by the defendant to the deponent and that there is a non-compliance of O. 41 r. 1(4) and r. 9(2) of RHC 1980. However, he has no objection to paragraph 4 of the first of the said three affidavits affirmed on the 19 September 1992 (hereinafter called "the first affidavit") and paragraphs 3 and 4 of the third of the said three affidavit affirmed on the 14 December 1992 (hereinafter called "the third affidavit").

In reply to the objection learned Counsel for the defendant in a rather very much unprepared manner agreed that paragraphs 10 and 16 of the first affidavit be struck out. As for the other paragraphs of the said three affidavits learned Counsel argued that:

(i) the contents are not hearsay as the deponent has personal knowledge before he mentioned information and belief;
(ii) the deponent obtained his knowledge, information and belief from documents in defendant's possession;
(iii) by referring to the documents in the possession of the defendant and to which the deponent has access, the deponent has acquired personal knowledge;
(iv) the deponent was affirming to the existence of the documents and statements made therein and not as to the truth of the contents;
(v) there is no provision to strike out a whole affidavit unless O. 41 r. 6 has been infringed;
(vi) it is the Court's discretion whether or not to strike out an affidavit or part thereof; and
(vii) Order 41 Rule 5 does not directly deal with hearsay evidence.

Learned Counsel also referred to s. 73A(2) of the Evidence Act 1950. But in my view no reliance can be made to this section as the dispute at this stage is on the standing of the said three affidavits.

B. *The Law*

Order 41 r. 5(1) and (2) of RHC 1980 provides:

> (1) Subject to O. 14, rr. 2(2) and 4(2), to paragraph (2) of this rule and to any order made under O. 38, r. 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

Order 41 r. 6 reads:

> The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

It has been held in an application to set aside the service of a writ of summons that where the deponent did not disclose as to how she obtained the knowledge or identify the source of her information, that part of the affidavit was not relied on by the Court. (See: *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman* [1986] 1 MLJ 426).

Where in a proceeding, though interlocutory in form, an issue has to be determined which will decide the rights of the parties, only those evidence which would be admissible at the hearing of the action under the ordinary rules of evidence should be considered: *Gilbert v. Endean (supra).* Such proceeding is also not interlocutory within the meaning of r. 5(2) of O. 41 of RHC 1980. It has also been held that where the matters included in an affidavit are plainly irrelevant it should be struck out; though merely scandalous ones need not necessarily result on such matters being struck out as scandalous matters may be relevant and may be the very matters requiring investigation by the Court: *Rossage v. Rossage & Ors. (supra).*

But 'whether the material to which objection is taken on the ground that it is not admissible in evidence is contained in a statement exhibited to an affidavit, or in the affidavit itself, the Court has, in my judgment, a complete discretion whether or not to strike it out, and a Judge cannot be said to be exercising his discretion improperly merely because he decides not to strike out the matter in question ... Inadmissible hearsay evidence may relate only to matters which are of little or no importance, even to matters the truth of which the other side may not dispute.' per Cross J. in *Re: J. (an infant)* [1960] 1 All ER 603 at p. 605 I to p. 606 A and D. (See also: O. 41 r. 6). The main consideration therefore in the exercise of such discretion is whether justice can be achieved with the action properly heard by the Court with or without the striking out of the inadmissible matters in an affidavit objected to. Where the Court decides to strike out the inadmissible matters in an affidavit and such inadmissible matters form a very high proportion of the affidavit, the whole of the said affidavit may be struck out. [See: *Rossage v. Rossage & Ors. (supra)*].

C. *The findings of the Court*

As noted earlier on in this judgment paragraph 4 of the 1st affidavit and paragraphs 3 and 4 of the third affidavit are not disputed by learned Counsel for the plaintiff and thus I do not have to rule on those paragraphs. Further, paragraphs 10 and 16 of the first affidavit are hereby struck out as the learned Counsel for the defendant conceded to their defects which I think rightly so.

I now proceed to deal with each of the three said affidavits in the light of the relevant principles of law.

(a) *The first affidavit affirmed on 29 September 1992:*

Paragraph 1.5 of the first affidavit reads:

> The facts affirmed herein are true to the best of my knowledge, information and belief; and/or are obtained from documents in the defendant's possession, custody or control.

From this paragraph it is clear that O. 41 r. 5(1) was not in the mind of the deponent or the solicitor who advised him. It seems to me that it is O. 41 r. 5(2) that was taken into account but the present application is not an interlocutory application generally as any decision thereof would decide the rights of the parties. (See: *Gilbert v. Endean (supra)*; *Rossage v. Rossage & Others (supra)*). Nevertheless I shall proceed to consider each of the subsequent paragraphs thereof. But before proceeding I rule that, contrary to the submission of learned Counsel for the plaintiff, the declaration without more of the deponent that he has been duly authorised to make the first affidavit is sufficient. It the deponent in fact has not been authorised and if it can be proven to be so he faces the legal consequences.

As regards paragraph 3 and the subsequent subparagraphs thereof with the exception of subparagraph (1) I find nothing to indicate that the facts asserted thereto are facts which the deponent is able of his own knowledge to prove. (See: *Kulanthayar Chettiar v. Koh Liak Phuang* [1951] MLJ 149). Further, the matters raised therein are not of a trivial nature as in my view they go to the core of the dispute. There is also no indication whatsoever on the source of information. At most therefore the deponent appears to acquire such knowledge from documents made available to him. But if the assertions of the deponent are to be taken as true it will mean that the contents of the documents are also to be taken as true without ascertaining the truth from the makers of the documents and that will be admitting plain hearsay evidence in a proceeding not being an interlocutory proceeding. It should not be the case and justice demands that it should not be so.

I do not think there would have been much obstacle if the purpose or intention of the deponent was only to affirm the existence of the documents as submitted by the learned Counsel for the defendant. But on close examination of paragraph 3 and the subparagraphs thereof it is obvious that the deponent wants the Court to accept what he has deposed to as the truth. I do not think such an approach comes within O. 41 r. 5(1). Accordingly I do not think paragraph 3 and the subparagraphs thereof can be relied upon except subparagraph (a).

For the same reasons aforesaid paragraphs 5, 6, 7, 8, 9, 12, 13, 14, 15, 17 and 18 of the first affidavit cannot be relied on as well. Indeed it is also obvious that the deponent is expressing

his opinion or conclusions on the contents of the documents exhibited without clear justification. Such expression of opinion or conclusion is irrelevant as it is for this Court to decide on such issues as may be found in the relevant documents exhibited by the parties. The remaining paragraphs may be relied upon at the hearing.

(b) *The second affidavit affirmed on the 11 December 1992:*

Having read and examined the paragraphs of this second affidavit I am of the view that for the same reasons given for the first affidavit, paragraphs 3, 5, 7, 8, 9, 10 and 11 cannot also be relied upon. The remaining paragraphs may be referred to at the hearing. I find paragraph 11 in particular to be irrelevant. I am also unable to consider paragraphs 3 and 7 in the form in which they stand. Though they purport to exhibit documents of which the existence may be within the knowledge of the deponent, the deponent has gone beyond that requirement by expressing his views, conclusion and asserting the truth of the contents of the documents when he is not the maker and having no personal knowledge of the contents therein. Such evidence is plain hearsay and inadmissible for the purpose of the hearing of this case. O. 41 r. 1(4) of RHC 1980 has also been ignored. I find no reason for the deponent to comment on matters which should best be left to the learned Counsel for the defendant to submit at the hearing. I cannot help thinking that the deponent or the solicitor for the defendant is confused and may probably be assuming that this matter is an interlocutory proceeding or may not even be aware of the requirements of O. 41 r. 5(1) and (2) besides indicating that these three said affidavits were rushed works inspite of the early notification of the hearing of this case.

(c) *The third affidavit affirmed on 14 December 1992:*

This affidavit is a corrective affidavit filed by the deponent when it was pointed out by learned Counsel for the plaintiff that paragraph 3 of the second affidavit was incorrect. But on reading paragraphs 5, 6 and 7 of this third affidavit I am also of the view that they do not comply with O. 41 r. 5(1). Paragraphs 5 and 6 indeed were attempts to justify by the deponent based on his opinion. As for paragraph 7 this Court cannot take it into account in the form in which it stands. Accordingly, paragraphs 5, 6 and 7 cannot be relied upon at the hearing.

D. *Conclusion:*

As the paragraphs aforementioned in the three said affidavits cannot be relied upon I hereby order that they be struck out in the exercise of my discretion. I am mindful that in striking them out the exhibits thereof are included. I leave it to the learned Counsel for the defendant to consider as to how those exhibits, if relevant, may be referred to at the hearing. If only their existence is being affirmed then an affidavit to that effect should be deposed leaving the contentious issues for submissions.

I allow therefore the objection of the learned Counsel for the plaintiff to the extent as indicated hereinabove.